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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1548

CARL DEAN WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to a conditioned probationary term.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

The judgment of the Court of Appeals was entered on January 8, 1971. See Appendix B to this petition.[1]

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional questions raised by petitioner are:

First Amendment. Is a civilian work order appropriate, where the conscience of the Selective Service System registrant is violated?

Fifth Amendment. May a valid work order be issued when the registrant submitted his work choices, ones that prima facie complied with the law, and a fair hearing and fair consideration of it was never given?

Eighth Amendment. Is a civilian work assignment that is violative of a I-O registrant's conscience a "cruel and unusual" punishment?

Ninth Amendment. Is conscription valid, absent a dire emergency?

---

1. A Petition for Rehearing was denied by the Court of Appeals on February 8, 1971. See Appendix C to this petition.

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to April 8, 1971.

Thirteenth Amendment. Is conscription for civilian work valid?

Article I, Section 8, ¶11. Is the present act, used only for support of the undeclared South-East Asia War, valid?

[All the above questions were raised by motion in the District Court and were briefed for the Court of Appeals.]

The trial errors raised in the District Court, and briefed for the Court of Appeals, are:

1. An incorrect jury instruction violated the Fifth and Sixth Amendments;

2. The jury demonstrably did not consider [could not have considered] the evidence admitted by the trial court.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First, Fifth, Sixth, Eighth, Ninth and Thirteenth Amendments and Article I, Section 8, Paragraph 11 of the Constitution and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. §§ 1606.51, 1624.1, and 1660.1. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction into civilian work [C.T. 1].

Appellant pleaded not guilty and was tried by the Honorable Harry Pregerson, District Judge, and a jury. He was found guilty and sentenced [C.T. 165]. Bond on appeal was set at O/R [C.T. 166].

6. FACTS

The facts are found in the record, chiefly the Selective Service System file of the appellant.[2]

For this appeal the essential facts begin with the classification of appellant in Class I-O [Ex. 12, dated October 12, 1967], although he had had a considerable, prior processing. This I-O was given after a searching discussion concerning "sincerity" during his appearance before Local Board, on October 12, 1967 [Ex. 100-102].

Appellant took no administrative appeal from this I-O classification, evidencing satisfaction with it, and, in his judicial appeal (as was true in the trial court) he made no attack on the classification, only on the validity of the subsequent administrative processing, plus errors that arose during the trial, plus constitutional questions.

When the SSS Form No. 152, Special Report for Class I-O Registrants, was mailed to him he promptly executed and returned it [Ex. 109-112], attaching a letter explaining his selections in more detail [Ex. 113].

This form [the forms are "law" (32 C.F.R. §1606.51)] invited him to submit selections, as follows:

> "By submitting a choice of employment you have an opportunity to select the type of work you will be more interested in and perhaps best qualified to do. There may be opportunities for performing approved types of work with nonprofit organizations, associations, or corporations or with local, State, or Federal governmental agencies. If you are qualified for positions that require special skills, training, technical knowledge, or professional education and experience, you should list

2. This file, Government's Exhibit, is pencil paginated at the bottom of each sheet and is hereafter referred to by the sheet number, such as [Ex. 1].

any additional information that will be of assistance to the employer in assigning you to work that can utilize your highest level of aptitude and skill." [Ex. 109].

At the *time* this petitioner was processed for the civilian work, the form sent him included, in the sixth paragraph of page one, the following:

"The local board cannot secure special skilled positions for you. However, it will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training."

Subsequently, after petitioner started to test the conduct of this agency, the following was deleted from this SSS Form: "[I]t will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training."

Instead of it making a decision, and making a true effort to "utilize" his training, as required [32 C.F.R. § 1660.20] the local board sent the file to the State Director, on November 16, 1967 saying:

"We are enclosing the complete cover sheet for the above-named registrant. His selective service number has been reached for induction; however, he is classified I-O.

"On November 2, 1967, an SSS Form No. 152, Special Report for Class I-O Registrants was mailed to him and was returned this date indicating he would perform civilian work.

"In view of the above, will you please review the file and advise." [Ex. 108].

The State Director replied to the local board, on November 14, 1967 stating:

> "We are returning the complete file of subject registrant after reviewing it at this headquarters.
>
> "The registrant *did not*[3] submit any approved *type* of civilian work. For that reason, it is necessary for you to submit three types of work you deem appropriate.
>
> "The following three types of civilian work which have been approved are available for Class I-O registrants at the present time:
>
> A. Institutional helper, Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California 90033. Salary $10.72 for an 8-hour day based on a 40-hour week.
>
> B. Truck driver helper, Goodwill Industries, 342 San Fernando Road, Los Angeles, California. Salary $125.00 to $150.00 a month for a 40-hour week.
>
> C. Psychiatric technician trainee, Atascadero State Hospital, Atascadero, California. Salary $255.00 to $281.00 per month for a 40-hour work week.
>
> "If the registrant comes into your board, it is suggested that you also show him Memorandum No. 209 which sets forth all the various types of approved work in the State of California." [Ex. 117].

The local board sent appellant a letter on November 28, 1967, giving him *the State Director's* three choices, closing with the following options:

> "You are requested to indicate your preference of the type of work for which you are best qualified by checking "A", "B", or "C" above. Please sign one of the following statements at the bottom of this page

3. This and all other italics have been supplied.

and return it to this local board in the enclosed self-addressed envelope, which requires no postage, within ten (10) days from the date of this letter.

By Direction of the Local Board
/s/ Patricia W. Matier
Clerk

1. I hereby offer to perform the work checked above in lieu of induction.

Signed .....

2. I do not wish to perform any of the types of work listed above, the reasons for which are stated on the reverse side of this letter.

Signed ....."

[Ex. 118].

The appellant promptly signed Option No. 1, adding: "See my note below" and, below, he wrote: "Note: I repeat my offer to do one of the three types of work I indicated on Form 152" [Ex. 118].

The appellant also sent a letter to the local board, dated December 1, 1967 as follows:

"I have your letter giving me three choices of work.

"You have made no comment on the three choices I set forth on your Form 152. It seems to me that my three choices were good ones, that is, they met the requirements of the law that the work be for non-profit organizations and that it contribute to the national health, safety, and interest.

"I do not doubt that the work you set forth in your recent letter is good, in fact all of it is almost certain to be good work. However the Form 152 says

that I could let you know of the work that I would like to do and that best suits my training and my abilities.

"Assuring you of my cooperation, I am" [Ex. 120].

The local board wrote the State Director, on December 7, 1967, stating:

"On December 5, 1967, the local board received the registrant's reply to our letter of November 28, 1967, *declining to accept any of* the types of work offered by the local board. The complete file is therefore forwarded to your Headquarters in order that you may appoint a representative to meet with the registrant and the local board as provided in section 1660.20 (c) of the regulations." [Ex. 122].

The State Director replied, on December 11, 1967 with his form letter arranging for the "arbitration" type meeting provided by § 1660 of the regulations [Ex. 123].

The local board wrote appellant *on January 12, 1968* informing him he would soon be invited to come for the "arbitration" meeting, their expression being "You are to be scheduled for an interview with the State Director's representative *to assist you in reaching an agreement* on the type of work which has been approved under the Conscientious Objector Work Program. You will be notified later as to the time and date set for this meeting." [Ex. 125]. It is to be noted that on *January 11, 1968* the local board made and entered its fact-finding decision [Ex. 112].

On January 19, 1968 the board sent appellant notice of the meeting (to be held on February 1, 1969) [Ex. 126]. He replied to the board on January 31, 1969 requesting a postponement, for the reasons given:

"As reported to your office by telephone this date, due to a prior business commitment I will be out of

the state February 1, and therefore unable to meet with the State Department representative.

"I would like to take this opportunity to advise you that negotiations are currently under way with Colonels Coray and Beasley, National Headquarters of the USO in Washington, D.C. to establish a Beach Boys tour program in Viet Nam, Thailand, and various U.S. military installations throughout the country and the world. UNICEF concerts and a tour of European army bases are being prepared by Paul Edwards at the United Nations. Simultaneously, Senators Murphy and Kuchel are trying to develop a format which would enable the Beach Boys to entertain underprivileged children and visit various state hospitals, mental institutions, etc. Mr. Huff of the State Department in Washington is also endeavoring on our behalf to set up a similar program.

"May I therefore request that the February 1 meeting be postponed until the next scheduled meeting in March, at which time I will be available to attend." [Ex. 127].

On March 7, 1968 the aforementioned "arbitration" meeting was held [Ex. 140-142] appellant pointing out his offers of work had never been discussed and that he was awaiting the authorization of the board to formalize his group's negotiations with various governmental agencies for the civilian work they wanted his group to do, that is, all five members of the musical group to do what the government agencies asked. The board's response was "It is not within our jurisdiction to assign you to any job that is not on the list of accepted work." [Ex. 141].

After notifying its State and National Headquarters the local board ordered appellant to work at the Los Angeles County General Hospital [Ex. 150].

On May 23, 1970 appellant appeared at the Los Angeles General Hospital [Ex. 155-158]. The essential facts

of this visit are "I'm here to determine what type of employment is available—I'm a conscientious objector and would like to know what's available."

* * *

"Mrs. Maggio: The job that is currently available is a male bedside attendant. You will be required to take a written civil service examination tomorrow, Friday, May 24, 1968 at 8:00 a.m. After the exam it would be necessary for you to take a physical examination. The written exam is being given tomorrow in room 1645.

"Carl: I see. I'm a musician and I would like to discuss with you and outline of what was presented to my SS board concerning my qualifications and how I can be best utilized—I would like to set up musical therapy classes at the hospital for patient rehabilitation purposes, and also have my group entertain the patients since I know there is an important need for this and covering this type area which I'm best suited and qualified for. This will be at no cost to the State for my services or the group's services.

"Mrs. Maggio: I don't think this would be possible since we have never done this before and because the patients possibly may be bothered by the music because of their illnesses, etc.

"Carl: Who can I speak to concerning this?

"Mrs. Maggio: Mr. Odell, the hospital administrator, or Mrs. Lewis, in charge of the Volunteer Services Dept., since they get involved with these type projects.

"Carl: We don't have to play music, but what about setting up music appreciation and therapy classes for rehabilitation purposes?

"Mrs. Maggio: The type therapy classes available are physical therapy classes for therapy and rehabilitation purposes.

"Carl: I see—where can I locate Mr. Odell and Mrs. Lewis?

"Mrs. Maggio proceeded to give us the information where these people can be located.

"Mrs. Maggio: Are you indicating that you are refusing the job that's available?

"Carl: No, I'm not—I would like to discuss with someone my proposal which I outlined in great detail concerning my involvement musically at no cost to the State, since there is a need for this. . . .

"We then went to the hospital administration office and asked for Mr. Odell and he was out and would be tied up in afternoon meetings. We again proceeded to leave Mr. Odell a similar note (copy attached) and signed by a secretary who, upon reading the note said 'Groovy—we can sure use that around here'—she signed the note and we then left." [Ex. 155-156].

On May 31, 1970 the State Director was notified of the situation by the hospital's personnel officer; including:

> "It is possible that a program can be developed which would take advantage of his talents. However, if he is obligated to begin his commitment now, we will have to evaluate his potential for success in terms of existing assignments." [Ex. 160].

The State Director wrote the Director (Washington) for a determination on prosecution [Ex. 165].

Meanwhile, and thereafter, appellant wrote the local board for consideration of his proposals; his associates wrote the board showing its advantages to the national interest. For example, Capitol Records wrote:

> "This is to advise you that the Beach Boys, of whom Carl Wilson is a most important member, are consid-

ered by Capitol Records to be one of our most important artists as well as being a major personality in the entertainment field as such." . . .

* * *

"It is our considered opinion that the morale of hospital patients, especially the young adult and teen-age group, would be lifted by concert appearances by the entire group or by individual personal appearances by Carl Wilson." [Ex. 170].

An example of appellant's request to the board for consideration, or a valid explanation of its rejection of his nominations is his letter to the board of November 25, 1968:

"At this time, please refer to my letters of Nov. 13, 1967, December 1, 1967, January 31, 1968 and June 25, 1968 (copies enclosed) where I have elaborately outlined a program to the Selective Service Board, *and have never received a reply.* This program, outlined in detail, states what value and benefit I can afford my country, and better serve my country. Your complete disregard of any consideration to my proposals has been arbitrary, and without reason." [Ex. 185]

* * *

"When I first met with the various people at the Los Angeles County Hospital and outlined my program, they indicated that this concept was excellent and would help considerably, and hopefully it could be worked out—you have statements to that effect in your files.

"I will, again, appreciate your consideration and attention in this matter, and will anticipate hearing from you after you have reviewed the proposal." [Ex. 186].

Appellant presented evidence on another matter: his fatherhood status [Ex. 254].

7. REASONS FOR GRANTING A WRIT

Several constitutional questions are present that have not been passed on by this Court, ones that involve presidential power to initiate and prosecute war.

Another, involving the First Amendment, is similar to the question before the Court in *David Eugene Berrier* vs. *United States,* on petition for a writ of certiorari to the United States Court of Appeals, Fourth Circuit. *Berrier* involves a work assignment for a conscientious objector that he asserts is contrary to his conscience.

Presented also are two procedural questions that go to the core of jury trial.

8. ARGUMENT

I

Agency Errors

A. First Amendment

The work assignment was in violation of this amendment.

The Selective Service System had recognized petitioner as a sincere conscientious objector. As such they knew he would not violate his conscience. Yet said officials issued a work order which demanded that of him. Such an order was a violation of petitioner's basic First Amendment rights, as well as violative of its own regulations.

In the historic flag salute case, *Board of Education* v *Barnette,* 319 U.S. 624 (1963), Mr. Justice Jackson, speaking for the Court, stated:

> ". . . no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." [624].

With the proverbial "insolence of office" the officials of the Selective Service System proceeded with their work order.

Freedom of conscience is included in the basic right of religious freedom guaranteed to petitioner by the First Amendment. Appellant was classified as a conscientious objector pursuant to an Act of Congress designed to protect both his freedom of religion and his freedom of conscience.

Thus to assign petitioner to a particular type of work rejecting, by ignoring, petitioner's appropriate job-type nominations was contrary to the very purpose of classifying him a conscientious objector. To waste his talents and to deprive the nation of his offered work, and without a rational explanation, is an example of bureaucratic shortsightedness that the courts should not countenance. No dire emergency was present. Such action was punitive. They wanted "to rub his nose in it."

Under the circumstances here, the work order was a violation of his First Amendment rights. Such an order was contrary to both the establishment and free exercise clauses of the First Amendment.

A man's religious conscience often covers more than religious dogma: outrage over waste of resources, of a man's life training, is a religion to many, held as clearly as the orthodox religious beliefs and, in the light of *Seeger* v. *United States,* 85 S.Ct. 850 (1965), petitioner had an exact parallel of belief.

A work assignment request should be put to the test of its depth and its sincerity. This was not done by the Selective Service System. Every intendment is to favor petitioner. He is one of the few (out of over 200,000,000 Americans) who has a certificate from the government that he is truthful and sincere. A I-O classification card, being based wholly on subjective evidence, is exactly that. Therefore there is a presumption he was truthful in his work offers and acting in good faith. No evidence to the contrary exists. Suspicion and speculation may not be used. *Dickinson* v. *United States,* 74 S.Ct. 152, 158.

Petitioner's prior conduct [the record, Ex. 86, shows petitioner once before, to defend his conscience, walked up to a prison door] and, subsequently by his present action he again met this severe test. Petitioner, a public figure whose life career depends on public favor, again risks prison and popular disfavor in order to obey his conscience. This First Amendment right must not be denied him.

B. Fifth Amendment

In the factual situation presented by the record various violations of the Fifth Amendment took place:

1. The arbitrary ignoring of his offered civilian work, and the arbitrary ignoring of his fatherhood status by the order to report for civilian work as set forth in detail hereinabove under FACTS.

A fair hearing and a fair consideration of each was never given.

2. The abdication of its assigned duty by the local board to choose suitable civilian work and the usurpation by the State Director of this function. This was compounded by the total ignoring of petitioner's special abili-

ties to contribute to the national welfare, as required, at that time, by its own regulations.

We have noted, in FACTS hereinabove, that the forms of this agency have the full force of its regulations [32 C.F.R. § 1606.51]. The regulations have the full force of "law." *Singer* v. *United States,* 323 U.S. 338.

In FACTS we showed that the form petitioner was required to execute, and did execute, provided, *at that time* "The local board cannot secure special skilled positions for you. However, it will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training." [Ex. 109] and that thereafter it was deleted and is not now present in this SSS Form 152.

We consider this is an implicit confession by the agency that it erred in this petitioner's processing.

3. The deprivation (by complete silence) of a III-A fatherhood classification by the Selective Service System was unreasonable and contrary to the Fifth Amendment.

At the time appellant Wilson notified his local board of his fatherhood status the law required that such registrants be given a III-A classification.

32 C.F.R. § 1622.30 said:

> "1622.30 Class III-A: Registrant With A Child or Children; and Registrant Deferred by Reason of Extreme Hardship to Dependants.—(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition

> under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

Not until April 27, 1970 did the President announce that this [fatherhood] deferment was abolished. Nevertheless, in said Executive Order 11527 (FEDERAL REGISTER, VOL. 35, 80-FRIDAY, APRIL 24, 1970) he went on to order:

> "7. Section 1622.30 is further amended by revoking subparagraphs (2) and (3) of paragraph (c), by redesignating paragraphs (b) and (c) (1) as paragraphs '(a)' and '(b)', respectively, and by inserting the following new paragraph:
>
> "(c) In Class III-A shall be placed any registrant who prior to the effective date of this paragraph in its present form submitted to his local board information establishing his eligibility for deferment on the grounds of fatherhood under regulations in effect prior to such date, or who is so classified prior to such date, and who continues to maintain a bona fide family relationship in their home with his child or children, except that this paragraph shall not apply to any registrant who subsequently becomes a physician, dentist or veterinarian."

Thus, April 23, 1970 [when the President changed the regulations] the fatherhood deferment was available. He should have had a hearing; he should have been reclassified. *Talcott* v. *Reed*, 9 Cir., 1954, 217 F.2d 360; *White* v. *United States*, 9 Cir., 1970, 422 F.2d 1254; *Wright* v. *SSS, etc.*, D. Minn., 319 F. Supp. 509 (1970).

4. Deprivation of legal counsel.

The Fifth Amendment, by implication, required that appellant have the right to legal counsel and legal representation in his dealings with the Selective Service System. This was denied him by the regulations of this agency. 32 C.F.R. § 1624.1 provides "And provided further, that no registrant may be represented before the local board by anyone acting as attorney or legal counsel."

The courts have liberally construed the due process guarantees of the Fifth Amendment. But even under a strict construction view of due process it is apparent that in the above cataloged respects appellant was dealt with unfairly and that his rights were violated.

C. The Eighth Amendment

The United States Constitution, Eighth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In *Wilkerson* v. *Utah*, 99 U.S. 130 (1879), the Supreme Court noted that:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.

But certainly it must be recognized as cruel and unusual for a government to punish a man for exercise of his religious freedom in general, and his freedom of conscience in particular, especially after the Government informed said citizen it would respect his freedom of religion and conscience.

By classifying petitioner as a I-O conscientious objector the Government was stating to him that it would respect his freedom of religion and protect his conscience. By the nature of its unjust and invalid work order, the Selective Service System was punishing him for exercising that freedom of conscience that the Constitution guarantees petitioner and which the Government has agreed to protect.

To convict a sincere conscientious objector for refusing to obey a work order which violated his conscience shocks the sense of justice. It is not only unfair but is cruel and unusual punishment after having given legal recognition to his conscience.

II

Trial Errors

A. Jury Not Instructed Properly

The defendant requested certain instructions and the trial court refused to give them [R.T. 210].

The Sixth and Seventh Amendments to the United States Constitution guarantee the right of trial by jury.

An accused is entitled to a fair and impartial jury trial. Anything which detrimentally deprives him of that right is a violation of his constitutional guarantees.

Thus it is the duty of the judge in a jury trial to properly and adequately instruct the jury.

Every judge must state to the jury, "You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me."

Several of the proposed instructions offered by the defense and essential for a fair and adequate jury trial were

rejected. They were essential, and attorney for petitioner objected that said instructions were not given [R.T. 209, line 21 and 210, line 19].

By omitting these instructions petitioner was prejudiced.

Of the proposed instructions offered by petitioner's attorney, the following were not given:

Defendant's Special Instructions No. 1, 2, 6, 7, 8, 9, 11, and 12.

Special Instruction No. 3 and Special Instruction No. 10 were covered inadequately by the Court in his instructions to the jury.

The Court instructed the jury:

> "You are further instructed that your duty here is not to sit as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. Local board action is final, and you are bound to accept the classification given to defendant." [RT. 202].

Yet local board action is not final if it is arbitrary and capricious and a jury is not bound to accept it, indeed it would be their duty to reject such action.

Dickinson v. *U. S.*, (1953) 346 U.S. 389, 98 L.Ed. 132, 74 S.Ct. 152.

Thus Defendant's Special Instructions No. 1 and 2, in which it was stated that draft boards may not act arbitrarily or capriciously and that lawless action by a draft board is void, were essential for the consideration of the jury in arriving at a verdict concerning petitioner.

It was pointed out in Instruction No. 1, "The Selective Service System cannot base its decisions upon specula-

tion nor can the local boards abdicate their authority to the State Director."

Petitioner was indicted for failure to obey an order to report for civilian work. If the jury believed that the board had acted arbitrarily or that it had abdicated its responsibilities, then under law it would have had to acquit petitioner. This was pointed out in Instruction No. 1 and the failure of the Court to give that instruction clearly prejudiced petitioner.

Not only did the Court fail to instruct the jury concerning the law on this point, but he stated, "You are instructed that the local board's assignment of defendant to work as an institutional helper at the Los Angeles County Department of Hospitals was proper." [R.T. 203].

Surely this was a matter of fact, not of law, and it was the jury's responsibility to decide this point, not the Court's.

He also failed to instruct the jury that if it acquitted petitioner it would be returning him to the Selective Service System for reprocessing and that this would have to be done in accord with the applicable Regulations.

It is possible that a juror might have been hesitant to acquit if said juror believed that by acquitting it was freeing petitioner of all Selective Service obligations. Hence it was essential to a fair consideration of petitioner's case that Instruction No. 2 be given to the jury. Thus the failure of the judge to give Instruction No. 2 was highly prejudicial to petitioner.

Standing alone, the fact that petitioner failed to report for civilian work did not establish his guilt. It was essential for the jury to understand that point, yet the Court failed to give Instruction No. 6 which contained said point of law.

"Due process" is a doctrine which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Sexton* v. *Barry,* 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property, U.S.C.A. Const. Amend. 5, *U. S.* v. *Masaaki Kuwabara,* 56 F. Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A. Const. Amend. 5, *U. S.* v. *Parcels of Land in Prince George's County, Md.,* 40 F. Supp. 436. In regard to "due process", it should be pointed out that the constitutional provisions for security of person and property should be liberally construed. U.S.C.A. Const. Amends. 4, 5, *U. S.* v. *Wheeler,* 149 F. Supp. 445.

If the order to report was a violation of due process, then the order was illegal and could not be enforced. This was pointed out in Instruction No. 7, which the Court failed to give to the jury.

This matter of due process is a matter of substance, not merely form. Due process requires actual consideration by the board and not merely a pretense of consideration or an approximation of consideration. If the board gave petitioner an order under circumstances where the record did not establish that actual bona fide substantial consideration was given then the jury would have had to acquit for due process would have been violated. The Court declined to give this No. 8 Instruction.

Petitioner was not represented or assisted by legal counsel before the local board. This violation of due process was covered in Instruction No. 9, which the Court failed to give.

Instruction No. 11, "If you find from all the evidence that the defendant acted with honesty of purpose and in a good faith effort to bring a test case to determine whether he ought to be ordered to report, then he may refuse to obey the order until its validity is determined by the courts," was not given by the judge.

This instruction was essential in regard to the intent of petitioner and whether he wilfully violated the law. Yet it was not given.

This matter of intent was covered thoroughly by petitioner in his Special Instruction No. 12. It is true that the Court speaks of intent in his general instructions [R.T. 190, 204] and indeed states that "specific intent must be proved before there can be a conviction." [R.T. 204]. But Instruction No. 12 was not covered by this reference to specific intent. For the Instruction stated, "If you find that the defendant honestly believed the law as it was applied to him by the Selective Service System to be invalid, then he did not have the specific intent to act wilfully and he is entitled to a finding of Not Guilty."

Thus one cannot but conclude that the general reference to specific intent in the instructions did not replace the requirement for the specific instruction to the jury contained in Special Instruction No. 12, which the Court did not give. This same conclusion must be reached concerning Instructions No. 1, 2, 6, 7, 8, 9, and 11.

Special Instructions No. 3 and 10 were somewhat covered by the Court [R.T. 185, 190, 204-205] but such coverage was inadequate and thus prejudicial to petitioner.

It is not error for a judge to refuse to tender special instructions to the jury when requested by defendant's attorney where matters included therein were amply cov-

ered by the general instructions of the judge. *Westmoreland* v. *Memphis Transit Co.*, 305 F.2d 71, 6th Cir., 1962.

But a careful reading of the transcript will disclose that while Special Instructions No. 4, 5 and 13 were included in the general instructions of the judge [R.T. 185, 188, 200, 205-206], Special Instructions No. 3 and 10 were inadequately covered, and Special Instructions No. 1, 2, 6, 7, 8, 9, 11 and 12 were not given nor covered [R.T. 185-210]. Such action was error and clearly prejudicial to petitioner.

Where the requests for special instructions are properly made the Court is required to give such instructions to the jury. *Chicago & N. W. Ry. Co.* v. *Green*, 164 F.2d 55, 8th Cir., 1947.

The proper requests for special instructions were made in petitioner's case. The Court failed to cover such instructions.

Thus petitioner's rights under the Sixth and Seventh Amendments were violated.

B. Jury Demonstrably Did Not Deliberate or Consider the Evidence

The trial involved three days and the only evidence of the prosecution was the 268 page Exhibit A (Selective Service System file of the defendant). It was not given to the jury until it retired [R.T. 187].

The jury was out 15 minutes [C.T. 161]. Defendant's motion for a new trial, based chiefly on the above fact, was denied [C.T. 160].

Fairness and due process require a jury to consider the evidence and give *some* deliberation to a case under consideration.

Indeed deliberation and discussion by the jurors in the jury room, in attempting to reach a verdict, is inherent in the verdict ultimately returned. *Armstrong* v. *United States,* 228 F.2d 764, 8th Cir. (1956).

It has been held that a jury, as a fact-finding body, has the duty to consider *all facts* and circumstances in evidence, meanwhile weighing preponderances, drawing inferences, balancing hypotheses and comparing delinquencies in light of their experiences as reasonable and honorable men. *Tombigbee Mill and Lumber Co.* v. *Hollingsworth,* 162 F.2d 763, 5th Cir. (1947), certiorari denied 68 S.Ct. 165, 332 U.S. 824, 92 L.Ed. 399.

A jury is *required* to conduct a fair and adequate consideration and deliberation of a case. For an "accused is entitled to a fair and impartial jury trial, and anything which affects or may affect that result constitutes an assault upon the foundations of the system of administering justice." *United States* v. *Rakes,* D.C. Va., 74 F. Supp. 645 (1948). Surely a failure by the jury to either *consider* all the evidence or to *deliberate at all* would affect the result and would be a violation of justice.

As Judge Palmieri wrote, "What is sacrosanct in a jury trial, is the right of a defendant to have the jury deliberate and apply the law. . ." *United States* v. *Ogull,* S.D.N.Y., 149 F. Supp. 272 (1957).

In our case the jury could hardly have "deliberated" *and* could *not* have examined the evidence and thus appellant's constitutional rights were violated. This claim is demonstrable, as we now particularize.

In the Selective Service cases the chief (and generally only) exhibit for the Government, and its *sole* evidence, is the registrant's Selective Service System file.

In this appeal this was true. Moreover, the Selective Service System file of petitioner contained 268 sheets. There can be no question but that a normal reading of this substantial volume, by one person, would occupy a minimum of an hour, especially when liberty and reputation of a defendant are at stake.

Yet in this case the jury announced to the bailiff it had reached a verdict within 15 minutes from the time it left the courtroom [C.T. 161].

Thus it must be concluded that the jury demonstrably did not consider the evidence, certainly it could not have read the 268 sheet Selective Service System file.

We submit that it must be logically concluded, additionally, that the jury did not properly deliberate concerning this three day case and that the petitioner was therefore deprived of due process of law.

Jurors in criminal cases must consider evidence for the purposes for which it was admitted, giving it a reasonable and fair construction and consideration. *United States* v. *Schneiderman*, D.C. Calif., 106 F. Supp. 906 (1952).

Beyond dispute this was not done in this case. The written evidence alone could not have been read.

Because the jury demonstrably did not consider all the evidence and thus violated its duty of fair and adequate deliberation the conviction should be reversed.

III

Legislative Errors

A. Sixth Amendment
It reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

The agency regulations (32 C.F.R. § 1624.2):

> (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him. *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

The Sixth Amendment rights of petitioner were violated in that in his dealings with the Selective Service System in regard to his work order he was deprived of the assistance of counsel. Assistance of counsel in such a situation was vital to petitioner and depriving him of such assistance was highly prejudicial.

B. Ninth Amendment

The Selective Service Act, and the Regulations, as interpreted and applied to Appellant, offend the Ninth Amendment to the United States Constitution.

The Ninth Amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. Legal scholars have pointed out that the principal effect of this amendment is to underscore the intention of the framers of the Constitution that essential human rights are to be protected from governmental interference or destruction and to complement the due process clause by providing a flexible instrument for protecting such rights.

Our form of government and our Constitution recognizes the inherent worth of each individual and that the courts have the constitutional duty to prevent the abridgment of inherent human dignity.[4]

Accepting this truism it follows that there are certain rights that all citizens possess though these rights are unenumerated in the Constitution. They are specific and are clothed with constitutional protection.

Over the years this Court has often spoken of those specifics of the first eight amendments which express fundamental personal rights. Other fundamental personal rights, no less important, not enumerated, are protected by the Ninth Amendment. As Mr. Justice Goldberg pointed out:

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold* v. *State of Connecticut,* 85 S.Ct. 1678 (1965). [1684].

4. Bertelsman, THE NINTH AMENDMENT AND DUE PROCESS OF LAW—TOWARD A VIABLE THEORY OF UNENUMERATED RIGHTS, 37 CINCINNATI LAW REVIEW 777, 794 (1968).

The Ninth Amendment to the United States Constitution states:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Mr. Justice Goldberg also stated:

> "The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." *Griswold* v. *State of Connecticut*, 85 S.Ct. 1678 (1965). [1684].

Thus it is clear that the Ninth Amendment was adopted to insure, in the felicitous phrase of Professor Dunbar, "that by enumeration of rights in the Constitution nothing has been lost; that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted to Congress."[5]

Indeed the principal effect of the Ninth Amendment is to underscore the intention of the framers of the Constitution that essential human rights are to be protected from governmental interference or destruction and to complement the due process clause in providing a flexible instrument for protecting such rights.

In presenting his proposed Amendment, James Madison said:

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5. Dunbar, JAMES MADISON AND THE NINTH AMENDMENT, 42 VIRGINIA LAW REVIEW 627, 643 (1956).

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]."

The history and the text itself of the Ninth Amendment provides unequivocally, that a citizen does have rights which are not specifically reserved to him by the text of the Constitution.[6]

Over the years this Court has recognized certain basic, inherent, human rights, which were not specifically mentioned in the Constitution. These are basic to human dignity and serve as the touchstones for all unenumerated rights.[7]

Since the Constitution guarantees these rights and liberties (both enumerated and unenumerated) then it follows that the citizens of the Republic have not delegated to their government the power to infringe upon these rights and liberties.

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6. Bertelsman, THE NINTH AMENDMENT AND DUE PROCESS OF LAW—TOWARD A VIABLE THEORY OF UNENUMERATED RIGHTS, 37 CINCINNATI LAW REVIEW 777 (1968).

7. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Poe* v. *Ullman*, 467 U.S. 497 (1961); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Ginsburg* v. *New York*, 390 U.S. 629 (1968).

One legal scholar has mentioned several of these Ninth Amendment unenumerated rights as inclusive of family rights, the right of privacy, the rights of personal fulfillment, and economic and property rights.[8]

These rights are among the most basic to that inherent human dignity which serves as the touchstone for all unenumerated rights, to defend the rights of other men, nor in order to defend the rights of society in general.

The framers of the Constitution did *not* delegate to the central government the power of conscription. Indeed when the father of the Constitution, James Madison, on June 8, 1789, introduced in the House of Representatives his twenty clauses for a federal Bill of Rights, conscription was not considered, but it was declared that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Article II.

The people have a right to bear arms, but nowhere does it state (in the Constitution or Bill of Rights) that the government has a right to conscript them to do so.

We contend that under the Ninth Amendment the government is prevented from conscripting its citizens. Thus under the Ninth Amendment the government may raise armies or military forces or any force whatsoever only by hiring volunteers. Any other such interpretation concerning this Amendment and conscription would destroy those other specific unenumerated rights in the Bill of Rights stated by this Court over the years. See I Annals of Congress 439.

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8. Bertelsman, THE NINTH AMENDMENT AND DUE PROCESS OF LAW—TOWARD A VIABLE THEORY OF UNENUMERATED RIGHTS, 37 CINCINNATI LAW REVIEW 777, 790 (1968).

We admit that in time of dire national emergency, where the very existence of the Republic itself is at stake, the federal government would be empowered to act with broader power. For example if the very shores of the Republic were invaded by foreign troops.[9]

However, in the present state of affairs the violation of constitutional safeguards and constitutional rights should not be permitted by the courts.

Thus while the government has a right to declare war, defend the Republic, and maintain military forces, the Citizen has individual constitutional rights, including the right to choose whether to fight or not to fight.

We conclude that the Ninth Amendment to the Constitution protects all rights of the individual citizen not specified elsewhere. This includes the right to choose one's own religious standards, as well as the right to life, liberty, and the pursuit of happiness. Included would be the right not to be conscripted against one's will. For if the citizen didn't possess this right he could not exercise fully his other unenumerated rights guaranteed to him by the Constitution and Bill of Rights and spelled out by the courts over the years.

We contend that the Ninth Amendment denies to the federal government all powers except those explicitly delegated to it by the Constitution. Since conscription was not a right specifically guaranteed to the federal government by the Constitution, it is prohibited by the Ninth Amendment's guarantee of unenumerated rights to citizens.

Thus, the draft law, as applied to petitioner, is in violation of the Ninth Amendment to the Constitution.

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9. "The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." *Ex parte Milligan*, 71 U.S. 2, at 127 (1866).

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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Attorney for Petitioner

April 8, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

CARL DEAN WILSON,
Appellant.

No. 25,606

[January 8, 1971]

Appeal from the United States District Court for the Central District of California

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Before: BARNES, DUNIWAY, and ELY, Circuit Judges

PER CURIAM:

Wilson was indicted, tried, and convicted for having violated 50 U.S.C. App. § 462, in that he had refused to report for civilian work as ordered by his local Selective Service Board. We affirm.

Wilson does not contest his classification as a conscientious objector (I-O). He contends, however, that the Board abdicated its responsibilities under the Act in relying on the State Director's list of acceptable civilian employments when it ruled that the work he himself suggested was not appropriate.

In *Mang v. United States*, 339 F.2d 369 (9th Cir. 1964), we held that there is no failure of due process or abdication of authority if a Local Board is *guided* by an approved

list of acceptable civilian employment. Of course, the Board must also give consideration to a registrant's suggestions, even though not on the list, which meet the criteria of "contributing to the maintenance of the national health, safety, or interest." 32 C.F.R. § 1660.20 (a). However, such required consideration is predicated on the submission, by the registrant, of some *specific* employment.

Wilson's offer to go on a musical tour of military bases and hospitals was commendable, and, in different circumstances, could have been deemed appropriate. As the offer was presented, however, it was so vague and ill-defined as to give the Board no alternative but to reject it. Wilson had arranged no definite commitments, had begun no formal negotiations and had submitted no proof of his ability to speak for the other members of the musical group of which he was a member;[1] hence, the Board was

1. For example, in his original suggestion that he be allowed to go on a concert tour in lieu of induction, Wilson described the job as follows:

> "There is a need for Rock and Roll Groups to tour various Army Installations, State Mental Hospitals and Vietnam. The Beach Boys are willing to render their services in touring these installations and institutions. The Armed Forces News has approached the Beach Boys on numerous occasions for their services and interest in touring various Army bases. The Armed Forces News has indicated the need for Rock and Roll groups to donate their services for the servicemen in Vietnam. The Beach Boys are willing to tour any and all Vietnam installations especially since our troops have requested and are desirous in seeing and hearing Rock and Roll groups. We are aware of the expenses involved in these type tours and are willing to render our services without any cost to our State Department. Our theatrical agents can arrange tours of this type under the auspicious [sic] of the State Department and Department of The Army as expediously as possible. The Beach Boys are most concerned in touring the State Mental Hospitals and having the various people in these institutions hear and have available Rock and Roll Groups in donating their time. As well as teaching these people the art of music writing, playing, formation of groups and music producing.

fully justified in making its determination that Wilson's suggestion was unacceptable.[2]

Wilson's other contentions, involving alleged errors at trial, an independent claim for a fatherhood deferment, and the constitutionality both of the Viet Nam war and of the Selective Service Act, are without merit.

Affirmed.

"Many Army Installations throughout the country have repeatedly inquired with our agents for the possible donating of Beach Boys services which we would like to fulfill.

"Since the Beach Boys have toured the World over the past five (5) years they have been approached by many servicemen asking and pleading for them to appear at their various Army Bases."

The job description was equally indefinite some four months later, when Wilson met with his Local Board and a representative of the State Director, pursuant to Regulation 32 C.F.R. § 1660.20 (c):

Board: ". . . . How close are you to this tour in Viet Nam you mention."

Wilson: "We have been corresponding with Col. Beasley in Washington, D. C. and Col. Coray in New York and they want us to go help the fighting man and the services now, we are just waiting word from this Board."

Board: "How long have you been negotiating?"

Wilson: "There has been no negotiation as such, just waiting for authority from this board."

Board: "Are these Colonels with the USO?"

Wilson: "I don't know, my manager handles all that."

2. The lack of specificity in the suggested employment distinguishes the present case from *United States* v. *Burton*, 402 F.2d 536 (9th Cir. 1968). Here, we need not reach, as we did in *Burton*, the validity of Board reliance on the State Director's list when confronted with a specific proposal for unlisted employment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. CARL DEAN WILSON, Appellant.	No. 25606

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Jan. 8, 1971.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 8, 1971

Before: BARNES, DUNIWAY, and ELY, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed January 25, 1971 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Amendments Involved

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Article of Constitution Involved

Article I, Section 8. The Congress shall have the Power * * *

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

Statutes and Regulations Involved

§ 456 (j) of UMT & S Act, as amended, in essential part reads:

> "(j) Conscientious objectors . . . shall . . . be ordered . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, or *interest as the local board may deem appropriate* and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title." (Emphasis supplied)

32 C.F.R. § 1606.51 reads:

> "1606.51 Forms Made Part of Regulations.—(a) All forms and revisions thereof referred to in these or

any new or additional regulations, or in any amendment to these or such new or additional regulations, and all forms and revisions thereof prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or in the instructions printed thereon, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement."

32. C.F.R. § 1624.5, in essential part reads:

"(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him. *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel."

32 C.F.R. § 1660.1—

"1660.1 Definition of Appropriate Civilian Work.—

(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory or possession of

the United States or by a political subdivision thereof, or by the District of Columbia.

* * *

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."